APPEAL NO. 93097

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On January 5, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue was "[w]hether or not Claimant was injured in the course and scope of his employment." The hearing officer determined that the respondent, claimant herein, was injured in the course and scope of his employment on (date of injury). Appellant, carrier herein, contends that the hearing officer erred in his decision and there is insufficient evidence to support the findings because of certain conflicting testimony and requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant, respondent herein, did not file a response.

DECISION

The decision of the hearing officer is affirmed.

The hearing officer found, and it is supported by the evidence, that claimant was a 32-year-old truck driver employed by (employer)., the employer herein, to haul saltwater from oil wells to disposal wells. Claimant testified he regularly drove truck No. 008, a large truck. Claimant's testimony was that in order to check under the hood of this truck, it was necessary to unlatch the hood and the entire hood and fender assembly would tilt forward to expose the engine. Replacing the hood assembly required grabbing the top, putting one foot on the bumper and then lowering the hood assembly. It was claimant's, and another witness's, testimony that No. 008's oil dipstick required a turn or so after insertion to secure it and that on occasion it would unlatch itself when jarred. When the dipstick would so partially disengage, it would allow oil to blow by the dipstick and get on the engine manifold. On the morning of (date of injury), claimant testified that he and his wife drove to the employer's yard. Around noon claimant was checking out No. 008 while his 14-year-old son, who had stayed with claimant's brother the previous night, watched. It was undisputed that one of the employer's owners came by the yard and suggested claimant's son go with claimant so he could learn how to "gauge the tanks" and "attach the hoses." Claimant stated that he and his son left the yard, and after getting something to eat, drove toward the first well. Claimant further stated that at a remote location and, approximately 16 miles after leaving the paved road, he smelled oil burning. Claimant says he asked his son if he smelled oil burning and when his son said he did, claimant stopped the truck, raised the hood assembly, checked and resecured the dipstick. Claimant testified, and is supported by his son, that as claimant was lowering the hood assembly, a gust of wind caused the assembly to suddenly jerk forward and claimant felt his lower back pop. Claimant testified he was able to get back in the truck and continued to the well. At the well claimant says his son did most of the physical work in connecting the hoses while claimant stayed in the truck and worked the controls.

Claimant stated that after loading up on the way out from the well, they met claimant's brother, JG, who was also claimant's supervisor. Claimant stated that he told J

he had hurt his back lowering the hood assembly of the truck after checking the dipstick. The testimony was that J asked claimant if he could continue working or if he needed to go back to town in the pickup. Claimant testified he said he would continue working. Both claimant and his son testified that when they got to the disposal well, another coworker was there and the coworker helped claimant's son unload the saltwater. Claimant states he continued to work until about 1:00 a.m. the next morning, Sunday, March 22nd. Claimant and his wife testified that claimant was off Sunday and Monday and that claimant laid around the house resting his back and hoping it would improve. When claimant didn't improve, it was claimant's and his wife's testimony that claimant's wife called the employer on Tuesday and told them claimant needed to go to the doctor for his back.

Claimant testified that he had had a prior compensable lower back injury which had been surgically fused in 1984 and that he had been off work for about three years until 1987. It was uncontradicted that claimant had since worked continuously, without problems, for the five years prior to the present injury. Claimant stated that on Tuesday, March 24th, he went to employer's office to fill out some papers so he could see a doctor and then he went to see (Dr. N), who claimant characterizes as the company doctor. Dr. N apparently sent claimant to (Dr. D) and Dr. L) before claimant eventually got into treatment with (Dr. LeG). Dr. L saw claimant on April 10, 1992 and April 16, 1992. Dr. L states claimant "will need to have [a] myelography and probable surgery at L5/S1 for a second disc herniation." On April 16th Dr. L referred claimant to Dr. L for evaluation. Dr. L, who saw claimant initially on April 23, 1992, found "total loss of lumbar lordosis." In response to carrier's deposition on written interrogatories, Dr. L states "I think the evidence of a new injury would be the fact that he had so much loss of the lordosis in his lumbar area and some tenderness over his left sciatic outlet with the diminished range of motion of his back . . . [and] objective evidence [being] the spasm in his back. . . ."

I

Carrier alleges as its first contention of error that the hearing officer's statement of evidence is not complete nor accurate because ". . . there is conflicting testimony between the statements initially given by Mr. G (from the argument we conclude carrier is referring to Mr G, not claimant) and his testimony at the contested case hearing." Carrier concedes ". . . that this Appeals Panel has stated, a number of times in its opinions that the contested case hearing officer is, in fact, the sole judge of the credibility and weight to be given to the testimony." We affirm that proposition. Article 8308-6.34(e). We also note that carrier points out ". . . that the only live witnesses that came forward to testify for the claimant are all related to him." While that statement is true, the mere fact that the four witnesses who corroborated claimant's claim are all related to claimant does not preclude their testimony. Rather, that fact would be something for the hearing officer to consider in judging the weight and credibility of the witnesses' testimony.

There are inconsistencies in the statement of Mr G given in a recorded interview on April 23, 1992, a signed statement dated 3-24-92 and his testimony at the CCH. The principal contradiction is that J initially states claimant's injury occurred at "7:30 a.m. or 8:00 a.m. March 21, Saturday 1992" when Jackie was told claimant was shutting the hood on his truck when "he thought he popped his back." Subsequently, Jackie stated that claimant told him it was "about 11:00 that his back was hurting" and that it occurred at the S and Y yard "when he was checking his truck out." At the CCH it was J testimony that he was told of claimant's injury as claimant "was coming off the (ranch/oil field)" and when claimant said he had hurt his back checking the oil dipstick, Jackie just assumed claimant ". . . hurt it when he was checking his truck out, . . . early that morning, is what I thought." We note that the trier of fact, as the judge of the credibility of the witnesses and the weight to be given their testimony, resolves the conflicts and inconsistencies in the testimony. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all or part or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer obviously accepted Mr G' explanation that when claimant told him that he had hurt his back lowering the hood assembly, J didn't realize it had happened on the road, but erroneously assumed it had occurred earlier in the routine pretrip truck inspection in employer's yard. The hearing officer is entitled to accept this explanation and to consider its source. We cannot find that the hearing officer's finding was so against the great weight and preponderance of the evidence as to be unfair or unjust. Pool v. Ford Motor Co., 715 S.W.2d 692 (Tex. 1986).

II

Carrier's second contention of error is that the hearing officer erred in his Findings of Fact Nos. 4, 5, 6, 7 and 8 ". . . in that there is either no evidence or insufficient evidence to support these findings." The complained of findings of fact set out claimant's version of the incident in question. Initially, we note that when reviewing a "no evidence" point of error, we examine the record for evidence that supports the finding while ignoring all evidence to the contrary. INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.-Houston [1st Dist.] 1988, no writ). In reviewing carrier's appeal, we conclude that carrier would concede there is some evidence to support the hearing officer's determinations. When reviewing questions of "factual sufficiency," we consider and weigh all the evidence, both in support of and contrary to the challenged finding, and uphold the finding unless we determine that the evidence is so weak or the finding so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Howeth, *supra*. Texas Workers' Compensation Commission Appeal No. 92256, decided August 3, 1992. In the instant case, evidence supporting claimant's position was claimant's virtually uncontradicted testimony, supported in large part by claimant's son, who had been urged to go on the trip by employer's owner. There is also testimony from BC, the coworker,

and incidently claimant's uncle, who helped unload the first load at the disposal well.

Even were we to discount Mr G' testimony, which was accepted by the hearing officer, there is sufficient evidence to support the hearing officer's findings. In challenging the hearing officer's findings on factual sufficiency, the carrier focuses almost exclusively on what it perceives are the contradictions and inconsistencies in Mr G' testimony. It apparently dismisses claimant's testimony, claimant's son's testimony, BC testimony and claimant's wife's testimony *solely* on the basis that those witnesses are all related to claimant and "[w]ithout anything further, that shows an underlying bias that has not been overcome in this record." Carrier cites no authority for its proposition that a relative's testimony automatically shows an "underlying bias" and should therefore be excluded, and we know of none. As indicated previously, the hearing officer was aware the witnesses were all related to claimant and as such their testimony is subject to being appropriately weighed by the hearing officer. The hearing officer found their testimony, as well as Mr G' testimony, sufficiently credible to support the complained of findings.

III

Carrier's final contention of error is that the hearing officer erred in concluding that "the claimant had sustained an injury within the course and scope of his employment." In reviewing carrier's argument, we understand this point to challenge the medical evidence as showing a prior surgery in 1984 which apparently carrier feels is the cause of claimant's current problem. Carrier, in its appeal, cites a visit by claimant to (Dr. C) on March 25th. We find no report from Dr. C among the exhibits nor is Dr. C's name mentioned on pages 27 and 28 of the transcript where claimant lists the doctors he did see. Carrier, in its argument implying claimant's present condition is due to a previous back injury, fails to address the uncontradicted fact that claimant had worked regularly for about five years prior to the incident in question. Claimant admitted to missing one day of work after straining his back in September 1991. We also note that we have held, under case law, that an injury under the 1989 Act may include an aggravation of a preexisting condition. Texas Workers' Compensation Commission Appeal No. 92216, decided July 10, 1992, citing Gulf Insurance Co. v. Gibbs, 534 S.W.2d 720 (Tex. Civ. App.-Houston [1st Dist.] 1976, writ ref'd n.r.e.). In Texas Workers' Compensation Commission Appeal No. 92047, decided March 25, 1992, we noted; "[t]o defeat a claim for compensation because of a preexisting injury, the carrier must show that the prior injury was the sole cause of the worker's present incapacity. Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977)." Although carrier offered extensive medical records relating to claimant's admitted 1984 back surgery and treatment, carrier fails to show that the 1984 injury was the sole cause of claimant's present problem. Further, carrier offers no medical evidence which rebuts Dr. L statement that there is objective medical evidence in the form of loss of lordosis in the lumbar region with diminished range of motion. Carrier's contention of error on this point is without merit.

The decision of the hearing officer is not so against the great weight of the evidence as to be clearly wrong or manifestly unjust and is hereby affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge